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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM

EDWARD JAMES KENNEY, JR.,
Petitioner and Appellant,
vs.
C. C. A. No. 12622

MALCOLM K. HATFIELD and
THOMAS N. ROBINSON,
Respondents and Appellees.

EDWARD JAMES KENNEY, JR.,
Petitioner and Appellant,
vs.
C. C. A. No. 12610

JOSEPH E. KILLIAN,
Respondent and Appellee.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

INTRODUCTION

On July 6, 1956, petitioner, Edward James Kenney, Jr., filed ten typewritten petitions for writ of certiorari and ten typewritten certified transcripts of record in the case of Edward James Kenney, Jr. vs. Joseph E. Killian with the Clerk of the Supreme Court of the United States and served respondents' attorneys with a copy of the petition and record. On July 12, 1956, the same procedure was followed in the case of Edward James Kenney, Jr., vs. Malcolm K. Hatfield and Thomas N. Robinson. On July 16, 1956, petitioner filed ten copies of motion for leave to proceed *in forma pauperis* and at the same time filed ten type-

written briefs in support of his petition for writ of certiorari in both of the above entitled causes, and at the same time served respondents' attorneys with a typewritten copy of the motion and the brief.

The legal principles applicable to the status of all of the respondents above identified, with the possible exception of the respondent Thomas N. Robinson, are so nearly identical that we are including all of the cases in the same brief. The appeal from the District Court to the Circuit Court of Appeals arose, in every instance, by reason of the granting of respondents' motion to dismiss.

At the time of the happening of the events alleged in the Bill of Complaint, the respondent Malcolm K. Hatfield was Probate Judge of Berrien County, Michigan; Thomas N. Robinson was a practicing attorney in Benton Harbor, Michigan; and Joseph E. Killian was Prosecuting Attorney for Berrien County, Michigan.

LEGAL QUESTIONS INVOLVED

1. The first legal question to be decided is whether the petitioner has complied with the Supreme Court rules which sets forth the requirements for a petition for a writ of certiorari.

2. The second legal question involved is whether the petition filed by petitioner Kenney sets forth meritorious questions to be decided by the Supreme Court of the United States. The questions involving this issue are set forth in the argument for each of the individual respondents.

PETITIONER HAS NOT COMPLIED WITH SUPREME COURT RULE 23

Respondents respectfully submit that petitioner has not complied with Supreme Court Rule 23 and that his failure to do so precludes him from having his petition for writ of certiorari granted by this Court.

Respondents submit the following reasons as to why petitioners' petition for writ of certiorari should be denied:

1. There is no reference to any official and unofficial reports of the opinions delivered in the Courts below as

required in Rule 23, subparagraph (a) of paragraph 1. Nor is there appended to the petitions, a copy of the opinions of the judgment sought to be reviewed as is required under subparagraph (i) of paragraph 1.

2. There is no concise statement of the grounds on which jurisdiction of this Court is invoked as required in subparagraph (b) (iii) setting forth the statutory provision believed to confer jurisdiction upon the Court. The petition although stating that suit was started in the United States District Court for Western Michigan under Section 1983 of *U. S. C. A.* Title XLXX and Section 1343 of *U. S. C. A.* Title XXVIII does not set forth in a statement of the case the basis for federal jurisdiction in the Court of first instance as required in Rule 23 paragraph 1 subparagraph (g).

3. The petitioner has failed to set forth with any degree of clarity the questions that he wants reviewed by this Court as required in paragraph 1 subparagraph (c), but merely states that the "said dismissal and affirmance" are in direct conflict with several cases cited in his petition. It would be pure conjecture to determine what the questions were even after reading the many cases cited in the petition.

4. The petition does not contain verbatim the constitutional provisions or statutes which the case allegedly involves as required in paragraph 1 subparagraph (d) of Court Rule 23.

5. The petition does not contain a direct and concise argument amplifying the reasons relied on for the allowance of the writ as required in paragraph 1 subparagraph (i) of Rule 23. Nor can the subsequent briefs filed by petitioner in support of his petition for writ of certiorari be of avail to him to support his argument that the writ should be granted. Paragraph 3 of Rule 23 is as follows:

> "All contentions in support of a petition for writ of certiorari shall be set forth in the body of the petition, as provided in subparagraph (h) of paragraph 1 of this rule. No separate brief in support of a petition for writ of certiorari will be received, and the clerk will refuse to file any petition for writ of certiorari to which is annexed or appended any supporting brief."

6. The petition filed by petitioner is not presented with accuracy brevity, and clearness as required in paragraph 4 of Rule 23. We submit that this rule was intended to cover such situations as are presented by the petition filed with this Court. We quote the paragraph as follows:

> "The failure of a petitioner to present with accuracy, brevity, and clearness whatever is essential to a ready and adequate understanding of the points requiring consideration will be a sufficient reason for denying his petition."

Respondents submit that upon reading the petition that it is impossible for a reviewing Court to obtain a "ready and adequate understanding of the points requiring consideration" and for this reason, along with the many other reasons heretofore cited, the petition for writ of certiorari should be denied.

PETITION NOT PRINTED IN CONFORMITY WITH RULE 39

Paragraph 2 of Rule 23 sets forth that the writ of certiorari shall be printed in conformity with Rule 39. The petitions filed by petitioner do not conform with Rule 39, which states that all records, petitions, motions, and briefs, must be in such form and size that they can be conveniently bound together, so as to make an ordinary octavo volume, having pages 6⅛ x 9¼ inches and typed matter 4-1/6 x 7-1/6 inches. Rule 21 sets forth that 40 printed copies of the petition shall be filed with the Clerk of the Court, which shall conform in all respects with Rule 23. Petitioner has filed only ten such copies of each, and these are typewritten rather than printed, as required by the rule. Petitioner, however, is attempting to circumvent this requirement by filing a motion for leave to proceed *in forma pauperis*. Respondents submit that even though petitioner's motion to proceed *in forma pauperis* has merit, he still cannot exercise a flagrant violation of the rule in other respects. He must still follow closely the procedure set forth in the Supreme Court rules, and a failure to do so, which we submit he has done, should not entitle him to any more consideration than any other petitioner petitioning for writ of certiorari.

BRIEF FOR RESPONDENT MALCOLM K. HATFIELD

We believe a short, concise statement of facts applicable to the sole question involved and discussed in this brief on behalf of Respondent and Appellee Malcolm K. Hatfield may be helpful to the Court, and we believe the facts stated in the opinion of the District Judge in deciding the Motion to Dismiss, may be helpful to the Court. We quote from the opinion of District Judge W. Wallace Kent, as follows:

> "Plaintiff files this action under Section 1983 of Title 42, U. S. C. A. (formerly Sec. 43 of Title 8), and under Section 1343 of Title 28, U. S. C. A., and under certain sections of the Statutes of the State of Michigan.
>
> "It appears that plaintiff, on or about the 18th day of November, 1950, was adjudged mentally ill by the defendant, Malcolm K. Hatfield, judge of Probate for the County of Berrien, Michigan, and was ordered committed to a hospital for the mentally ill.
>
> "The commitment was pursuant to a petition made by one William J. Pugh, a deputy sheriff of Berrien County, Michigan. It is alleged by the plaintiff that the making of such petition by Pugh was on recommendation of defendant, Thomas N. Robinson, who was then a licensed attorney, practicing law in the City of Benton Harbor, County of Berrien, Michigan.
>
> "On November 28, 1950, plaintiff was taken into custody and delivered to the Kalamazoo State Hospital, an institution for the mentally ill maintained by the State of Michigan in Kalamazoo, Michigan, where he was confined until on or about the 17th day of August, 1952.
>
> "Subsequent to his release from the hospital, plaintiff filed an action in the Circuit Court for Berrien County, Michigan, to test the validity of the proceedings leading up to his commitment. After hearing the commitment was determined to be void because the proceedings did not comply with the provisions of the applicable statutes of the State of Michigan.

"The Plaintiff and all of the defendants are residents of the State of Michigan.

"It is the theory and claim of the plaintiff that the defendant Hatfield was acting under color of State Law but without jurisdiction and contrary to the law and contrary to the provisions of the Constitution of the United States in the proceeding which resulted in plaintiff's commitment to the hospital.

"There are no specific allegations relative to any conspiracy among the four defendants, and a reasonable reading of the complaint as amended, viewed in the light most favorable to the plaintiff, does not disclose any implication that such a conspiracy existed. There is no claim on the part of the plaintiff that any of the defendants acted because of any malice, either actual or implied, directed toward this plaintiff as an individual, or directed toward any other individual alleged to be mentally ill.

"Basically, plaintiff alleges that each of the parties participated, at some point, in a series of acts which resulted in the confinement of the plaintiff in the hospital referred to, and in his continued detention in that institution. It is the theory and claim of the plaintiff that the acts of the several defendants amounted to a deprivation of his rights, privileges and immunities contrary to the Constitution of the United States and the laws on which the action is based.

"As to the defendant Malcolm K. Hatfield, who was at the time of the alleged improper action, and is now, the Judge of Probate for Berrien County, Michigan, the determination of the liability of such defendant depends primarily on the liability of judges, for civil damages, because of errors in assuming jurisdiction, or because of errors in the exercise of jurisdiction, in cases which are properly before the court over which said judge presides."

ARGUMENT

QUESTION NO. 1:

Is a Judge of Probate presiding over a Probate Court of the State of Michigan immune from liability, alleged under the Civil Rights Statute (now 42 *U. S. C.* § 1983 and 28 *U. S. C.* § 1343), for alleged errors in assuming jurisdiction, or because of alleged errors in the exercise of said jurisdiction where the case was properly brought before the said Probate Court which had jurisdiction over the subject matter and the person involved?

Circuit Court of Appeals held "Yes" and the Appellant claims "No".

Before discussing the case we will quote briefly the provisions of the statutes under which the appellant bases jurisdiction of the present action. 28 *U. S. C.*, Sec. 1343 as amended provides:

> "The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:
>
> '(1) To recover damages for injury to his person or property, or because of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in section 1985 of Title 42:
>
> '(2) To recover damages from any person who fails to prevent or to aid in preventing any wrongs mentioned in section 1985 of Title 42 which he had knowledge were about to occur and power to prevent;
>
> '(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States.' "

Appellant bases his right to recover in the present action on 8 *U. S. C.*, § 43 (now 42 *U. S. C.*, § 1983), which provides:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

The appellant in his brief assumes that because it was found in a suit in the Circuit Court for the County of Berrien that the petition filed in the Probate Court was insufficient to justify the commitment of the appellant to an institution that then the Probate Court was without jurisdiction in the sense that the Probate Court acted beyond the authority granted him as a Probate Judge.

We want to point out that there is a clear distinction between a case where the court has no jurisdiction over the subject matter that is before the court, and a case where the court *does have* jurisdiction over the subject matter but the pleadings are defective or the evidence is insufficient.

In this case we want to point out that the appellee Malcolm K. Hatfield, had jurisdiction over the person of the appellant, Edward James Kenney, Jr., who was a resident of Berrien County and that he had jurisdiction over the subject matter which was a proceeding for commitment.

Sec. 13 of Article VII of *The Michigan Constitution* of 1908 prescribes the jurisdiction of the Probate Courts and that Section of the Constitution reads as follows:

> "In each county organized for judicial purposes, there shall be a probate court. The jurisdiction, powers and duties of such courts and of the judges thereof shall be prescribed by law, and they shall also have original jurisdiction in all cases of juvenile delinquents and dependents."

The Probate Code of 1939 of the State of Michigan which is Sec. 27.3178 of the *Michigan Statutes Annotated*, is defined as "An act to revise and consolidate the statutes relating to the organization and jurisdiction of the Probate Courts of this State; the powers and duties of such courts, and the judges and other officers;"

Sec. 14.811 of the *Michigan Statutes Annotated* specifically provides that certain persons designated in the Statute, and one of them being a sheriff or a peace officer within the county in which such alleged mentally deceased person resides or may be, may petition the Probate Court of said county for an order directing of said person to a hospital, home, or institution for the care of the insane, feeble minded or epileptic and the statute then proceeds to define the procedure.

There is no controversy and in fact the pleadings admit it, that the appellant, Edward James Kenney, Jr., was in fact a resident of the County of Berrien, State of Michigan, and that the appellee, Judge Hatfield, was the Probate Judge of that County. The petition for the commitment of the appellant was filed in the Probate Court of that County which had jurisdiction over the person of the appellant Kenney and over the subject matter.

It is true that Judge Sweet (Circuit Judge of Kalamazoo County who sat in the Circuit Court proceedings brought in Berrien County), did state in his opinion as pointed out on page 14 of the appellant's brief, that the Judge of Probate "had no power, authority, or jurisdiction to issue the order", but we believe that the word "jurisdiction" as used in that connection was merely intended to mean that the showing made before Judge Hatfield for the commitment of the plaintiff was insufficient both on the face of the petition which was filed and on the testimony taken or showing made in Probate Court to justify an order of commitment and we respectfully submit that the proceedings were brought in the proper jurisdiction and that the Probate Judge Malcolm K. Hatfield had jurisdiction to entertain such a petition, to proceed to a hearing thereon and to make a determination, and it is our position that if the determination was incorrect or not justified, the Judge still acted within his jurisdiction and in his capacity as a Judge of Probate.

Under the cases hereinafter referred to we believe it is rather clear that a Judge acting in his judicial capacity is immune from liability and we believe it is equally clear that the Civil Rights Act does not afford a remedy if the Judge acting under color of his office should make a mistake.

In the case of *Whittington vs. Johnston*, 5 Cir., 201 F. 810, 812, the court said:

> "If the plaintiff's contentions are correct, then one who invokes the jurisdiction of a state court in a lunacy proceeding acts at his peril, and becomes liable under 8 U. S. C. A. § 43 in the event it turns out that the statute under which the court acts, or the procedure followed by the state officers in administering it, do not satisfy the requirements of due process. To hold the defendants liable in such circumstances would impose upon them a vicarious liability not contemplated by 8 U. S. C. A. § 43. That statute does not require those who regularly institute a lunacy proceeding under a state statute to stand sponsor for the validity of the statute, nor for the acts of the state officers in administering it.
>
> "Plaintiff alleges that in instituting the lunacy inquisition, the defendants acted willfully and maliciously. But this adds no strength to the complaint under 8 U. S. C. A. § re. Neither the Fourteenth Amendment nor the Civil Rights Acts purport to secure a person against unfounded or malicious lunacy proceedings. If the facts here involved make out a case of false arrest or malicious prosecution, the redress of such wrongs is left with the states. Compare Lyons v. Weltmer, 4 Cir., 174 F. 2d 473; McCartney v. State of West Virginia, 4 Cir., 156 F. 2d 739."

In *Smith vs. Israel*, D. C., 110 F. Supp. 425, the court quoted with approval from *In re Huse*, 9 Cir., 79 F. 305, as follows:

> " 'It is within the province of the state legislature to determine the method of procedure that should be followed in procuring the confinement of persons who have become insane to such an extent as to render

> them dangerous to the community, or to themselves, to be at large. If the steps provided for by the statute of the state have not been followed, the redress of persons who have been improperly confined without warrant or authority of law is by application to the courts of the state. The federal courts ought not, except in extreme cases, if at all, be called upon to interfere. * * * It was never intended by congress that the courts of the United States should * * * obstruct the ordinary administration of the criminal laws, or laws relating to the confinement of insane persons, through its own tribunals.' "

Also see *Harvard Law Review*, Vol. 68, May 1955, pages 1229-1240.

In *Screws vs. United States*, 325 U. S. 91, 108, the court said: "The problem is not whether state law has been violated but whether an inhabitant of a State has been deprived of a federal right by one who acts under 'color of any law.' ". See also *Ortega vs. Ragen*, 7 Cir., 216 F. 2d 561; *Mueller vs. Powell*, 8 Cir., 203 F. 2d 797. In *Moffett vs. Commerce Trust*, 8 Cir., 187 F. 2d 242, certiorari denied 342 U. S. 818, the court said at page 248:

> "The Federal Constitution does not guarantee a citizen against loss through fictitious or fraudulent litigation or through erroneous decisions of State Courts on question of State law nor, as we have seen, does it gurantee uniformity of decisions on the part of State courts nor protect the citizen against the invasion of private rights by private parties."

In *Bottone vs. Lindsley*, 10 Cir., 170 F. 2d 705, 707, the court stated:

> " 'The Fourteenth Amendment did not alter the basic relations between the States and the national government.' Screws v. United States, supra, 325 U. S. at page 109, 65 S. Ct. at page 1039, 89 L. Ed. at page 1495, 162 A. L. R. 1330. Nor does it 'assume uniformity of decisions or immunity from merely erroneous action. * * *' See Justice Frankfurter concurring in Snowden v. Hughes, 321 U. S. 1, 15, 64

S. Ct. 397, 404, 88 L. Ed. 497. See also Moyer v. Peabody, supra (212 U. S. 78)."

Judge Kent, in deciding the case now before the court on this appeal, insofar as it pertains to this appellee, did not cite any cases, excepting however, that he did refer to another opinion by Chief Judge Raymond W. Starr in a similar case entitled *Edward James Kenney, Jr., Plaintiff, vs. Raymond W. Fox, Defendant*, 132 F. Supp. 305 which also reviewed the decisions on this subject matter and which held for the very same reasons existing in this case that a Circuit Judge was immune from liability. It is significant that the same plaintiff was involved in that case and it is even more significant that no appeal was taken by the plaintiff from that decision.

In the opinion of Judge Starr in the case of *Edward James Kenney, Jr., plaintiff, vs. Joseph E. Killian, defendant*, case No. 12610 now before this court, the District Judge made the following pertinent statement which we believe is very pertinent to the question now involved. We quote from his opinion as follows:

> "This statute (42 U.S.C. § 1983) was originally enacted by the Congress in the turbulent days of reconstruction following the Civil War. Since then it has remained in a rather dormant state and has not been substantially revised or modified. It is only in comparatively recent years that resourceful plaintiffs and lawyers have invoked this statute as a basis for civil actions for money damages against public officials acting in the course of their official duties. Although the statute remains on the books and in force, it certainly seems clear that the Congress by its enactment in the reconstruction period never intended that it should be used as a basis for civil actions for damages against judges, prosecuting attorneys, sheriffs, prison wardens, and other public officers acting in their official capacities in good faith and in pursuance of State law. See Tenney v. Brandhove, 341 U. S. 367; Francis v. Lyman, 1 Cir., 216 F. 2d 583; Ginsberg v. Stern, D. C., 125 F. Supp. 596, affirmed June 2, 1955, by the Court of Appeals for the Third Circuit."

The question as to immunity from liability of Judges is discussed in 30 *Am. Jur.* under the subject "Judges" Sec. 43 at page 755, where the rule is stated as follows:

> "As a general rule, subject to certain qualifications hereinafter noted, a judicial officer cannot be called to account in a civil action for his determination and acts in his judicial capacity and within his jurisdiction, however erroneous. For a mere error of judgment in the execution of his office, no action can be maintained against a judge of any court, and he should not be mulcted in costs or other forms of damages because of judgments rendered by him. This principle may be said to be as old as the beginning of the English common law. It rests upon considerations of public policy, its purpose being to preserve the integrity and independence of the judiciary, and to insure that judges will act on their own free, unbiased convictions, uninfluenced by any apprehensions of consequences."

Throughout the appellant's brief he takes the position that the Probate Judge acted without jurisdiction. We have heretofore pointed out that the Probate Judge had jurisdiction over the subject matter and over the person of the appellant. In 30 *Am. Jur.* under the discussion "Judges" Sec. 45 at page 759 jurisdiction is defined as follows:

> "Jurisdiction is defined as the authority to act officially in the matter then in hand. According to some courts, in order to protect a judge from civil liability for his acts he must have jurisdiction over the person as well as the subject matter; and there are statements in some of the cases to the effect that he is not liable if he had jurisdiction of the person and the subject matter. But other courts hold that jurisdiction of the subject matter is sufficient, on the ground that the question whether he had jurisdiction of the parties is a matter for the judge's own determination."

In the opinion of the District Judge in this case, he found that no malice, either actual or implied, is charged against

any of the respondents. We quote from the opinion of the District Judge as follows:

> "There is no claim on the part of the plaintiff that any of the defendants acted because of any malice, either actual or implied, directed toward this plaintiff as an individual, or directed toward any other individual alleged to be mentally ill."

The appellant recognizes in his brief that there is no claim or allegation of malice. We quote from page 9 of the appellant's brief as follows:

> "The complaint alleges that the appellee Hatfield signed the order of admission *without* jurisdiction, (Paragraph Four). Moreover, the Complaint alleges that the appellee Hatfield decreed the imprisonment of the appellant under the following circumstances (Paragraph Seven):
>
> 1:— Without the authorization of the statute;
>
> 2:— In wilful and wanton disregard of the law and the facts;
>
> 3:— Without jurisdiction."

The rule as to immunity of Judges is so broad that there is respectable authority for the proposition that a Judge is immune from liability even though he acts maliciously.

In 30 *Am. Jur.* under the subject "Judges", Sec. 50 at page 764 the rule is stated as follows:

> "Effect of Malice or Want of Good Faith. — As a general rule, subject to certain qualifications hereinafter noted, judicial officers acting within their jurisdiction are exempt from liability in civil actions for their official acts, although such acts are alleged to have been done maliciously and corruptly. If guilty of misconduct, they may be impeached or removed, and this is the only manner in which they can be called to account in such cases. This is universally true with respect to judges of courts of general jurisdiction, even where they act in excess of their jurisdiction. Accord-

ing to many of the authorities, the rule also applies to judges of courts of inferior or limited jurisdiction, and they are not liable for acts wholly within their jurisdiction merely because they act maliciously or corruptly."

In the footnote at page 764 of 30 *Am. Jur.* under Sec. 50, appears the following pertinent statement:

> "If civil actions could be maintained in such cases against the judge because the losing party should see fit to allege in his complaint that the acts of the judge were done with partiality or maliciously or corruptly, the protection essential to judicial independence would be entirely swept away. Few persons sufficiently irritated to institute an action against a judge for his judicial acts would hesitate to ascribe any character to the acts which would be essential to the maintenance of the action. Bradley v. Fisher, 13 Wall (U. S.) 335, 20 L. ed. 646; Waugh v. Dibbens, 61 Okla. 221, 160 P. 589, L. R. A. 1917B 360."

In disposing of the question of judicial immunity, the opinion of Judge Martin, after citing many cases to support his position, concluded that:

> "We are of the firm opinion that the common law of immunity of a judicial officer for acts done in the exercise of his judicial function where he has jurisdiction over both parties and the subject matter, has not been abrogated by the Civil Rights Act".

The Court of Appeals then quoted the following excerpt from the case of *Ginsberg vs. Stern*, 125 F. Supp. 596:

> '"It would appear incongruous and contradictory to the doctrine of judicial independence, to hold that judicial officers of a state stand in a less favorable position than do state legislators, in respect to immunity from civil liability for acts done in their official capacity" '.

The court further cited *Francis vs. Crafts,* 203 F. (2d) pages 809 and 811, quoting the following language from that case:

> "It is axiomatic that the same immunity which applies to state legislators in the performance of their legislative duties would have application to the official acts of judges".

The Court of Appeals cited and relied upon the case of *Tenney vs. Brandhove,* 341 U. S. 367, as holding that the Civil Rights Act

> "could not have been intended to deprive state legislators of their pre-existing and well established complete immunity from civil liability for official acts done within the sphere of legislative activity."

BRIEF FOR RESPONDENT JOSEPH E. KILLIAN

The essential facts concerning this action are so well stated in the opinion of the Honorable Raymond W. Starr, District Judge, that we adopt his statement:

> "Plaintiff brings this action in pursuance of 8 U. S. C. § 43 (now 42 U. S. C. § 1983) and 28 U. S. C. § 1343), and in his complaint he alleges that he resides in Benton Harbor, Berrien County, Michigan and is a member of the State Bar of Michigan and engaged in the active practice of law; that the defendant Joseph E. Killian at the time of the occurrence of the events alleged in the complaint was the prosecuting attorney of Berrien County, Michigan; that the defendant in his capacity as prosecuting attorney on November 16, 1950, 'approved and issued or caused to be approved and issued, a certain warrant or arresting document' in pursuance of Comp. Laws Mich. 1948, § 330.19 as amended by Act No. 313, Pub. Acts 1949 (Stat. Ann. 1953 Cum. Supp. § 14.809), and that by virtue of this warrant or arresting document the plaintiff was seized by officers of the sheriff's department of Berrien County and confined in the county jail for a period of about 40 hours; that during his arrest and confinement he was denied the right of counsel."

Based on the allegations in the complaint, the plaintiff contends:

> "That the defendant as prosecuting attorney was not justified in approving or authorizing his arrest or confinement by Comp. Laws Mich. 1948, § 330.19, as under that section a person could be arrested and detained in temporary protective custody only if he manifested homicidal or other dangerous tendencies; that plaintiff did not at any time exhibit such tendencies; that he was denied due process of law; and that the conduct of the defendant as prosecuting attorney constituted an invasion of the plaintiff's rights secured under the Fourth, Fifth, Sixth and Fourteenth Amendments of the Constitution of the United States, contrary to 42 U. S. C. § 1983. Plaintiff further al-

leges that as a result of his seizure and detention he has suffered physical and mental harm, exhaustion, shock and humiliation, and has suffered and will suffer medical and hospital treatment and expense; and that he has suffered injury both temporary and permanent to his reputation as a member of the community and as a practicing lawyer. In his complaint the plaintiff asks for a judgment against the defendant for money damages in the amount of $20,000 plus punitive and exemplary damages of $5,000 and also costs and attorney fees. The plaintiff subsequently filed an amendment of his complaint reading in part as follows: 'Paragraph nine is amended by adding the averment that this action also sounds in false imprisonment.'

"It appears from the files and records in this case that in the preparation and filing of his complaint the plaintiff was represented by Attorney Harold Norris of Detroit, Michigan. However, it further appears that Attorney Norris subsequently withdrew as attorney for plaintiff, and that the plaintiff's amended complaint and all later motions and briefs were prepared and filed by him acting in his own behalf.

"The defendant filed answer denying that he issued a warrant or document for the arrest of the plaintiff; denying that the plaintiff was denied the right of counsel or the privilege of communicating with counsel; and alleging that the plaintiff was, in fact, permitted to communicate and did communicate and consult with his counsel. The defendant further alleges that on November 16, 1950, the sheriff of Berrien County, pursuant to Comp. Laws Mich. 1948, § 330.19, sought and obtained the approval of the defendant as prosecuting attorney to take the plaintiff into temporary protective custody; and that such approval was given by the defendant with justifiable cause, as the plaintiff had in fact manifested homicidal and dangerous tendencies and the defendant had reason to believe that he was mentally ill and was manifesting homicidal and dangerous tendencies within the meaning of the provisions of Comp. Laws Mich. 1948, § 330.19 (Stat. Ann. § 14.809). * * * in part as follows:

"At the hearing in open court on the motions of the parties now under consideration, there was put in evidence a copy of the written approval or authorization which the defendant as prosecuting attorney gave the sheriff of Berrien County relative to taking the plaintiff into temporary protective custody in pursuance of § 330.19 quoted above. This approval or authorization reads as follows:

'November 16, 1950

'Mr. Erwin H. Kubath, Sheriff
St. Joseph, Michigan

Re: Edward J. Kenney, Jr.
849 Pipestone Street
Benton Harbor, Michigan

'Dear Sir:

'It has been represented to this office that the above person is insane and manifesting homicidal and other dangerous tendencies and therefore you are authorized to take such person into temporary protective custody and to confine him for a period of not to exceed 48 hours, not including Sundays and legal holidays, all as provided in Section 14.809 of the Michigan Statutes Annotated, as amended (Comp. Laws Mich. 1948, § 330.19 as amended).

'Yours very truly,

JOSEPH E. KILLIAN,
Prosecuting Attorney.'

"It appears that after the plaintiff had been detained in temporary protective custody for about 40 hours on November 16th and 17th, the probate court of Berrien County on November 18, 1950, determined and adjudged him to be mentally ill and committed him to the Kalamazoo State Hospital, where he was confined until about August 17, 1952. However, from exhibits filed in the present action it appears that in a subsequent proceeding instituted by the plaintiff in the circuit court of Berrien County, an order or decree was entered in October, 1954, declaring his commitment to the State Hospital on November 18, 1950 to be null and void."

ARGUMENT

QUESTION NO. 1:

Does the Complaint filed in this cause allege a cause of action "for false imprisonment" or for "malicious prosecution" which is barred by the two year statute of limitations of the State of Michigan?

The statute of limitations of the State of Michigan, which was set up by the respondent as a special defense, is Section 27.607 of the *Michigan Statutes Annotated*, sub-section (3) (1948 *Michigan Statutes Compiled Laws*, Section 609.13, sub-section (3)), which provides as follows:

> "Actions against sheriffs for the misconduct or neglect of themselves, or their deputies, for assault and battery, for false imprisonment, for malicious prosecution, for malpractice of physicians, surgeons or dentists, all actions for the recovery of any penalty or forfeiture on any penal statute brought in the name of the people of this state, and actions brought to charge any surety for costs, or on bond or recognizance given on appeal from any court in this state, shall be brought within 2 years from the time the cause for action accrues, and not afterwards:"

The appellant in his brief, at page 12, takes the position that the cause of action stated in the complaint is one for "Abuse of process" and that an action for abuse of process is governed by sub-section (2) of Section 27.605 of the *Michigan Statutes Annotated*, which controls actions to recover damages for injuries to person and property and actions for trespass on land and which provides that the action may be brought within three years.

Appellant takes the position that the District Judge ignored this section of the statute and that he did not pass upon the question raised by the appellant which he refers to as Question One, page 12, Appellant's Brief. We submit that the decision of the District Judge must of necessity pass upon that question because he found in his opinion that this was an action that was controlled by sub-section (3) of the statutes of limitations, which cover actions for

false imprisonment or for malicious prosecution, and we will refer to the Opinion of the District Judge where he discusses this question as follows:

> "The plaintiff alleges that on November 16, 1950, the defendant caused officers of the sheriff's department of Berrien County to seize him, and that said officers confined him in the county jail for approximately 40 hours. The complaint was filed and summons issued in the present action November 10, 1953, which was approximately two years and 358 days after his confinement in the Berrien County jail on November 16 and 17, 1950. In the amendment of his complaint plaintiff alleges in effect that his present action is for false imprisonment. The applicable Michigan statute, Comp. Laws Mich. 1948, § 609.13, subd. 3, provides: 'Actions * * * for false imprisonment, for malicious prosecution * * * shall be brought within 2 years *from the time the cause for action accrues*, and not afterwards.'
>
> "It is clear that if the plaintiff had a cause of action against defendant for false imprisonment, such cause of action *accrued* upon his arrest and confinement for about 40 hours in the Berrien County jail on November 16 and 17, 1950. Hence, his cause of action, if any, accrued nearly three years prior to his filing complaint in the present case. Therefore, it is obvious that his present action is barred by the Michigan two-year statute of limitations, as the time for filing an action under the Federal civil rights act is controlled by the applicable State statute of limitations. See Wilson vs. Hinman, 10 Cir., 172 F. 2d 914; Gordon vs. Garrson, D. C. 77 F. Supp. 477."

The appellant in discussing this question, takes the position that the letter written by the respondent, Joseph E. Killian, as Prosecuting Attorney, was "the issuance of an arresting document" (page 13 Appellant's Brief), and appellant also takes the position that the appellant was arrested by virtue of such an "arresting document".

The nature of the document and how the matter was handled is very well covered in the Statement of Facts contained in this brief and which is taken from the Opin-

ion of the District Judge, who, we believe, has fairly and correctly stated the facts, and we submit that this is not a case where the Prosecuting Attorney issued a "process" of any kind nor a situation where he caused the appellant to be "arrested".

It is also significant to note as the Court pointed out in the Opinion that the appellant filed a motion to amend his complaint, which motion was allowed, and the complaint was accordingly amended so as to provide as follows:

> "Paragraph nine is amended by adding the averment that this action also sounds in false imprisonment."

An action for false imprisonment or malicious prosecution are causes of action well recognized in the State of Michigan and we think the District Judge was entirely correct in finding that under the state of the pleadings and the facts therein stated the basis of the alleged cause of action stated in the complaint was a cause of action for malicious prosecution and for false imprisonment and that that action fell squarely within sub-section (3) of Section 27.605 of the *Michigan Statutes Annotated,* which covers limitations of actions.

QUESTION NO. 2:

If the two year statute of limitations is applicable, does the fact that the Plaintiff was confined to a State Hospital for the "mentally ill" toll the statute?

The Opinion of the District Judge which sets forth the facts applicable to this case recognizes that it might be urged that because the appellant was confined to the Kalamazoo State Hospital under an order of the Probate Court declaring him mentally ill, that a question arises as to whether or not his confinement in the hospital would toll the statute so that the statute of limitations would not run until he was released.

It is rather significant that the appellant in his brief does not urge the proposition that the statute might be tolled because he was in the hospital, but he takes the posi-

tion rather that the action did not accrue until the termination "of the continuous imprisonment." We submit that that position of the appellant is entirely without merit and we believe the Opinion of the District Judge covers this point very well. We will quote from the Opinion of Judge Starr:

> "The plaintiff's contention that his alleged tort claim against the defendant was continuing in character and included the period of his subsequent confinement in the Kalamazoo State Hospital, is wholly without merit, as his detention in the Berrien County jail for 40 hours was only for his temporary protective custody under the applicable State statute, Comp. Laws Mich. 1948, § 330.19, hereinbefore quoted. Furthermore, the defendant as prosecuting attorney had no reason to expect that in the subsequent probate court proceedings the probate judge would make an illegal commitment of plaintiff to the State hospital. He had the right to assume that the proceedings in probate court would be regular and proper. See Nash v. Mayne, 340 Mich. 502. Therefore, the plaintiff's subsequent confinement in the Kalamazoo State hospital under commitment by the probate court was not a continuation of the action of the defendant in connection with his being taken into temporary protective custody on November 16, 1950.
>
> "It should be noted that plaintiff makes no claim that the running of the State statute of limitations was tolled by his insanity when his cause of action accrued on November 16 and 17, 1950. Comp. Laws Mich. 1948, § 609.15 provides:
>
> 'If any persons entitled to bring any of the actions mentioned in this chapter (which includes false imprisonment) shall, at the time *when the cause of action accrues*, be within the age of 21 years, insane, or imprisoned in the state prison, such person may bring the action within the times in this chapter respectively limited, after the disability shall be removed.'
>
> "At the time of his confinement in temporary protective custody by the sheriff on November 16 and 17, 1950, the plaintiff was over 21 years of age and was

not confined in a State prison. He is presumed to have been sane until he was subsequently on November 18, 1950, adjudged to be mentally ill. Furthermore, plaintiff makes no claim that he was mentally ill or insane at the time he was held in temporary protective custody. In fact, in his complaint in this action and in his complaint in his above-mentioned Civil Action No. 2415 pending in this court, he contends in effect that he was sane and that he did not manifest any indication of insanity or of homicidal or dangerous tendencies at the time he was taken into temporary protective custody on November 16, 1950, or at the time of his subsequent commitment by the probate court to the State hospital. Therefore, it is clear that plaintiff was not insane within the meaning of § 609.15 quoted above at the time his cause of action accrued on November 16 and 17, 1950. In 34 Am. Jur., § 203, page 163, it is stated:

'As a general rule, in order to suspend the running of the statute of limitations, the disability of incompetency must exist at the time of the accrual of the cause of action.' "

In this regard we want to point out that the rights under the statute of limitations are solely by virtue of *Statute* and there is nothing in the statutes of the State of Michigan that we can find which tolls the running of the statute of limitations merely because a person claims he does not have access to legal counsel. Pertinent provisions of the statute on the question of insanity or confinement is the section of the statute we have already referred to and that section is not broad enough to toll the statute merely because a person claims that he is confined to a hospital or other institution and is not able to get legal counsel.

QUESTION NO. 3:

Does a claim for damages for the alleged wrongful detention of the Plaintiff under a written approval or authorization by the Defendant as Prosecuting Attorney in pursuance of *Michigan Statutes*, Section 14.809, constitute a valid claim for relief under and by virtue of the Federal "Civil Rights" Statute (now 42 *U. S. C.*, Section 1983 and 28 *U. S. C.*, Section 1343)?

Appellant bases Federal-court jurisdiction of the present action on 28 *U. S. C.*, § 1343 as amended, which provides:

> "The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:
>
> "(1) To recover damages for injury to his person or property, or because of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in section 1985 of Title 42;
>
> "(2) To recover damages from any person who fails to prevent or to aid in preventing any wrongs mentioned in section 1985 of Title 42 which he had knowledge were about to occur and power to prevent;
>
> "(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States."

Appellant bases his right to recover in the present action on 8 *U. S. C.* § 43 (now 42 *U. S. C.* § 1983), which provides:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any

rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

The District Judge who decided this question made a very careful analysis of the decisions, reviewed many decisions which will be of assistance to this Court on this appeal and rendered a well reasoned opinion on this subject matter. We believe the Opinion of the District Judge on this question and the cases there cited, should be very helpful to the court in the consideration of this question and we will therefore quote from the District Court's opinion the reasoning and the cases cited, as follows:

"The plaintiff bases his present action on the Federal civil rights statutes. However, it must be kept in mind that such statutes give a right of civil action only for deprivation of rights, privileges, and immunities secured by the Constitution and Federal Laws. Therefore, to maintain his present action under the civil rights statutes, the plaintiff must allege facts showing that the defendant's acts and doings as prosecuting attorney did deprive him of rights, privileges, and immunities secured by the Constitution and laws of the United States.

"Comp. Laws Mich. 1948, § 330.19, provides in part:

"Any peace officer of this state with the approval of the prosecuting attorney, obtained within 24 hours of the taking into custody and confinement, is hereby authorized to take into temporary protective custody and confine for a period of not to exceed 48 hours, not counting Sundays and legal holidays, any person believed to be mentally ill manifesting homicidal or other dangerous tendencies.

"In the present case the defendant, acting as prosecuting attorney and in pursuance of the above State Statute, authorized the sheriff of the county as a peace officer to take the plaintiff into temporary protective custody, and the sheriff took the plaintiff into temporary protective custody and held him for about 40 hours. No provision of the Federal Constitution or

amendment thereof guarantees the plaintiff against being taken into protective custody by a peace officer of Michigan acting in pursuance of the applicable State Statute."

The following cases have been extensively quoted from in the foregoing brief on behalf of the respondent Malcolm K. Hatfield and we will not re-quote the excerpts further in this brief. The cases referred to in supporting the principles contended for by the respondent Killian, are as follows:

Screws vs. United States, 325 U. S. 91, 108;
Ortega vs. Ragen, 7 Cir., 216 F. 2d 561;
Mueller vs. Powell, 8 Cir., 203 F. 2d 797;
Moffett vs. Commerce Trust Co., 8 Cir., 187 F. 2d 242;
Bottone vs. Lindsley, 10 Cir., F. 2d 705, 707;
Snowden vs. Hughes, 321 U. S. 1, 15, 64 S. Ct. 397, 404, 88 L. Ed. 497;
Moyer vs. Peabody, supra, (212 U. S. 78);
Whittington vs. Johnston, 5 Cir., 201 F. 2d 810, 812;
Smith vs. Israel, D. C., 110 F. Supp. 425;
In re. Huse, 9 Cir., 79 F. 305.

See also *Harvard Law Review*, Vol. 68, May 1955, pages 1229-1240.

"The plaintiff in the present action bases his claim for money damages against the defendant as prosecuting attorney on the civil rights statute (42 U. S. C.) § 1983) hereinbefore quoted. This statute was originally enacted by the Congress in the turbulent days of reconstruction following the Civil war. Since then it has remained in a rather dormant state and has not been substantially revised or modified. It is only in comparatively recent years that resourceful plaintiffs and lawyers have invoked this statute as a basis for civil action for money damages against public officials acting in the course of their official duties. Although the statute remains on the books and in force, it certainly seems clear that the Congress by its enactment in the reconstruction period never intended

that it should be used as a basis for civil actions for damages against judges, prosecuting attorneys, sheriffs, prison wardens, and other public officers acting in their official capacities, in good faith and in pursuance of State law. See Tenney v. Brandhove, 341 U. S. 367; Francis v. Lyman, 1 Cir. 216 F. 2d 583; Ginsberg v. Stern, D. C. 125 F. Supp. 596, affirmed June 2, 1955, by the Court of Appeals for the Third Circuit. The court accordingly holds that the alleged acts and doings of the defendant as prosecuting attorney of Berrien County did not deprive the plaintiff of any rights, privileges or immunities guaranteed to him by the Constitution of the United States and amendments thereof. Therefore, as plaintiff's complaint fails to show that he has suffered the deprivation of a Federal right, privilege or immunity, his complaint fails to state a claim upon which relief could be granted under the civil rights statutes."

In the above Opinion, the District Judge referred to the case of *Francis vs. Lyman* (First Circuit), 216 F. 2d 583, and we believe that the Opinion of Chief Judge Magruder of the Court of Appeals of the First Circuit has effectively stated in the following language the interpretation which the Court should give to the Civil Rights Act. At page 587 of the Opinion, the Court said:

"When courts come to deal with a statute phrased in terms of such vague generality, they are faced with two possible alternatives: (1) They may give effect to the statute in its literal wording and thus reach results so bizarre and startling that the legislative body would probably be shocked into the prompt passage of amendatory legislation. This seems to be the approach which the Third Circuit intended to take in its opinion in Picking v. Pennsylvania R. R. Co., 1945, 151 F. 2d 240. (2) The courts may refuse to regard the statute as an isolated phenomenon, sticking out like a sore thumb if given a strict, literal application; and upon the contrary may conceive it to be their duty, in applying the statutory language, to fit the statute as harmoniously as may be into the familiar and generally accepted legal background, and

to confine its application, within reason, to those situtions which might possibly have had the approval of the Congress if it had specifically adverted to the particular cases, bearing in mind the basic purposes which gave rise to the legislation in the first place. We leave it to others to determine whether such judicial process may fairly be characterized as 'interpretation' of the intent of Congress, as disclosed in the statutory language, or whether it is something else. At any rate, it is a function which courts sometimes feel called upon to exercise and indeed which in many cases they are expected to exercise.

"From the trend of decisions applying this particular statute, we think it no longer appropriate for this court to proceed in accordance with the first of the above alternatives."

We respectfully submit that the District Judge was correct in his holding that the appellant was not entitled to any relief under the so-called Civil Rights Act.

QUESTION NO. 4:

Under the facts alleged in the Complaint, does it affirmatively appear that the Defendant acted as a public official (Prosecuting Attorney) in the exercise of his discretion as a public officer, acting within the scope of his official authority, so as to render him immune from legal liability for the acts complained of?

The complaint alleges Paragraph 3, and it is admitted in the answer, that the respondent at the time of the acts complained of was Prosecuting Attorney for the County of Berrien and it affirmatively appears by the complaint that any acts committed by the respondent were by virtue of his office as Prosecuting Attorney.

The rule as to the liability of a public official for acts done in the performance of his office is well stated in 43 *American Jurisprudence* under the subject of "Public Officers", Section 274 at page 86, where it is stated as follows:

"*Error or Mistake in Exercise of Authority.* Where an officer is invested with discretion and is

empowered to exercise his judgment in matters brought before him, he is sometimes called a quasi-judicial officer, and when so acting he is usually given immunity from liability to persons who may be injured as the result of an erroneous or mistaken decision, however erroneous his judgment may be, provided the acts complained of are done within the scope of the officer's authority, and without wilfulness, malice, or corruption.

"This immunity from civil liability for a mistake in judgment extends to errors in the determination both of law and of fact. Therefore, where the question of an officer's liability is involved, it is not material whether he used reasonable care in ascertaining the facts on which his judgment was founded. As regards errors of law, he is equally protected when he adopts a mistaken construction of an act of Congress or a state statute, or when he misunderstands the common law. The judicial or discretionary privilege does not, however, protect ministerial officers who act wrongfully, although in good faith, and a like rule obtains with respect to an officer exercising ministerial functions even though he may also be charged with judicial or discretionary duties. In cases where an official or board acting in a quasi-judicial capacity within the scope of its authority errs, commonly the law affords an aggrieved party adequate relief by resort to one of the extraordinary writs."

The above rule goes so far in protecting public officers, particularly officers exercising judicial functions, that in most jurisdictions they are immuned from liability even though malice is claimed. The rule is well stated in Section 276 of 43 *American Jurisprudence* under the subject "Public Officers" at page 88 where it is stated as follows:

"*As Affected by Malice.* The rule of immunity from personal liability for acts performed within the scope of official authority is, in some jurisdictions and in some instances, extended to officers acting maliciously or from other corrupt motives. Thus, the rule of immunity is in general extended to judges

of superior courts, when exercising judicial functions and acting within their jurisdiction, irrespective of the motives that may prompt their action. And a similar rule is applied to officers acting in a judicial capacity. Likewise, the rule has been extended to executive officers generally. And during recent years a trend is observable, it is said, extending the application of the rule to minor executive officers."

It is held in the case of *Sweeney vs. Young*, 131 A. 155 reported in 42 *A. L. R.* 757, that when the duty of a public officer is to pass on evidence and make decision thereon, that the performance of the duty of such a public officer is a *judicial act*.

We believe that an officer acting in a judicial capacity such as the respondent did under the allegations in the complaint, namely, he had to pass upon the sufficiency of evidence which was presented to him and under those circumstances he is entitled to the benefit of the rule applicable to Judges which is discussed in 30 *American Jurisprudence* under the discussion of "Judges", Section 43, beginning at page 755, where it is stated as follows:

"As a general rule, subject to certain qualifications hereinafter noted, a judicial officer cannot be called to account in a civil action for his determination and acts in his judicial capacity and within his jurisdiction, however erroneous. For a mere error of judgment in the execution of his office, no action can be maintained against a judge of any court, and he should not be mulcted in costs or other forms of damages because of judgments rendered by him. This principle may be said to be as old as the beginning of the English common law. It rests upon considerations of public policy, its purpose being to preserve the integrity and independence of the judiciary, and to inure that judges will act on their own free, unbiased convictions, uninfluenced by any apprehensions of consequences.

"Generally speaking, the exemption from liability extends to all grades of judges. Thus, it applies to judges of courts of superior or general jurisdiction,

and they are not liable civilly for judicial acts which are wholly within their jurisdiction, or *even for acts in excess of their jurisdiction. As to such judges the exemption is absolute, and they are not liable even though they acted maliciously or corruptly.* It also extends to judges of courts of inferior and limited jurisdiction, although in some states the protection afforded them is less extensive. De facto judges are within the protection of the rule as well as judges de jure. The rule of immunity does not extend, however, to acts which are not judicial in character. Particular acts as judicial or ministerial within the operation of the rule are discussed in a subsequent section."

We believe the Michigan Supreme Court in the case of *Mundy vs. McDonald*, 216 Mich. 444, recognized the general rule above stated as to public officers acting in a judicial capacity. It is true that case is related to a Circuit Judge but we believe the opinion recognizes that that is the rule where the person involved acts in a "judicial capacity". It is also significant to note that in the case of *Mundy vs. McDonald* it was alleged in the declaration that the defendant acted "falsely, wickedly and maliciously" and that the defendant published "certain false, scandalous, malicious and defamatory libel." The question was raised by a motion to dismiss and at page 451 of the Opinion the Court held that the question could be raised by a motion to dismiss and the Court there stated:

"That defendant acted in a judicial capacity cannot, we think, be questioned. What he did, he did as a circuit judge. The statute gave him power to conduct the proceedings. The principle that judges and courts of superior jurisdiction are immune from actions based upon judicial acts may be said to be as old as the beginning of the English common law.

"In Newell on Slander and Libel (3d Ed.) § 520, the rule is stated as follows:

'In England, and generally in the United States, a judge or a court has an absolute immunity, and no action can be maintained against him, even though it be alleged that he spoke maliciously knowing his

words to be false, and also that his words were irrelevant to the matter in issue before him, and wholly unwarranted by the evidence.' "

We respectfully submit that if the respondent in this case can be answerable in damages to the appellant because the respondent as Prosecuting Attorney authorized the detention of the appellant then we submit that any Prosecutor is subject to a suit for damages whenever he authorizes the issuance of a warrant based on evidence presented to him and we submit that that cannot be the law. Whether or not there is sufficient evidence or insufficient evidence presented to the Prosecutor to authorize the issuance of a warrant certainly cannot form the basis for a suit for damages because the Prosecutor is called upon to weigh the evidence which as stated in the above authorities is a judicial act and entitles the Prosecutor to the benefit of the rule of law relating to judicial offices.

In discussing the immunity of public officials in the case of *Dunn vs. Estes*, D. C., 117 F. Supp. 146, the court said at page 148:

> "It is crystal clear that certain public officials, at least those exercising quasi-judicial functions, acting within the sphere of their duties enjoy the same absolute privilege as judges and the reason for the policy is, as Judge Hand states in Gregoire v. Biddle, 2 Cir., 177 F. 2d 579, 580, 581, to permit public officers to act unflinchingly in the discharge of their duties and without a constant dread of retaliation."

The case of *Eaton vs. Bibb*, 7 Cir., 217 F. 2d 446, was a consolidation of two cases instituted by the plaintiff under the civil rights statutes. In the second case the defendants were the State's attorney for Rock Island County, Illinois, the sheriff and deputy sheriff of the county, and an agent of the Federal Bureau of Investigation. In sustaining the District Court's dismissal of the complaints in these actions, the court said in part, page 448:

> "In (Case) No. 11233, the defendant King was the state's attorney at Rock Island, Illinois, where the trial of plaintiff was held. This Court decided in

Cawley v. Warren, 216 F. 2d 74, that a state's attorney was a judicial officer of the State of Illinois and while acting in his official capacity was immune from civil liability under the Federal Civil Rights Act. * * *

"Laughlin v. Rosenman, 82 U. S. App. D. C. 164, 163 F. 2d 838, is a leading case declaring that prosecuting officials are not to be amerced by actions under the Federal Civil Rights Act for their actions in connection with official prosecutions even though it is alleged that such acts were done maliciously. In the Laughlin case, it was specifically charged that the prosecuting officials acted without probable cause and for the purpose of prosecuting the defendant whom they knew to be innocent. The court there stated in 82 U. S. App. D. C. 164, 163 F. 2d at page 842: 'The contention of the plaintiff that the rule of immunity of public officers from civil liability is inapplicable to the defendants in the instant case because they, as alleged, from ulterior motives, knowingly and wilfully concocted false testimony against him, is resolved against the plaintiff by the settled course of judicial decision.' "

In the case of *Cawley vs. Warren*, 7 Cir., 216 F. 2d 74, the plaintiff began an action for damages against the State's attorney of LaSalle County, Illinois, and the first assistant State's attorney of that county and the foreman of the county grand jury, charging that they conspired to deprive her of her constitutional rights. In sustaining the dismissal of the action the appellate court said:

"The motion to dismiss the complaint states, *inter alia*, that the alleged actions charged against the defendants were done in their official capacities, wherefore they are not amenable to suit under the Civil Rights Act. In this court the defendants likewise contend that they are immune from a suit of this kind.

"The law supports this claim of immunity. It extends to and includes judges, prosecuting attorneys and members of a grand jury. In Alzua v. Johnson,

231 U. S. 106, 34 S. Ct. 27 at page 29, 58 L. Ed. 142, involving a judge, at page 144, the court said:

> "'* * * we regard it as fundamental that the immunity of the defendant (the State's attorney) from this suit is the same as that of judges in the United States, which is established beyond dispute. Bradley v. Fisher, 13 Wall. 335, 20 L. Ed. 646; Randall v. Brigham, 7 Wall. 523, 19 L. Ed. 285.'"

After reviewing the above authorities, the Court found in his Opinion, at page 13:

> "It appearing that the acts of the defendant of which the plaintiff complains were performed by the defendant in the good-faith exercise of his discretion as prosecuting attorney and were performed within the scope of his statutory authority, the court accordingly holds that under the alleged facts and circumstances, and the well established rules of law, the defendant is immune from civil liability to the plaintiff under the Federal Civil Rights statutes."

The Circuit Court of Appeals held that the District Judge

> "Has supplied in his opinion compelling reasons for his dismissal of Kenney's action against the Prosecuting Attorney, who was acting in his official capacity in connection with all actions of which appellant complains. A Prosecuting Attorney is a quasi judicial officer and enjoys the same immunity from a civil action for damages as that which protects a judge acting within his jurisdiction over the parties and the subject matter of the litigation".

Citing *Giselli vs. Goff*, 12 F. (2d) 396, 404; *Cawley vs. Warren*, 216 F. Ed. (2d) 74-76.

BRIEF FOR RESPONDENT THOMAS N. ROBINSON

The respondent Robinson at the time of the matters alleged in the bill of complaint, was a practicing attorney in the City of Benton Harbor, Michigan. He prepared the original petition for the signature of another who had knowledge of the facts upon which the lunacy proceedings were based.

The amended complaint alleges that the appellee Thomas N. Robinson was a practicing attorney in the City of Benton Harbor, Michigan, at the time of the happening of the events set forth in the bill. Appellant claimed that the appellee Robinson, as an attorney, induced one William Pugh to sign a petition alleging that the appellant at that time was mentally incompetent. He also avers that the appellee Robinson prepared the petition. He also alleges that the appellee Robinson "Induced a certain William Pugh, a deputy sheriff for said county of Berrien, to subscribe, verify under oath, and file with the Probate Court for the County of Berrien, on November 15, 1950." He further alleges in paragraph 7 of the amended bill of complaint, that "plaintiff alleges upon information and belief, that said certificates (doctors' certificates declaring plaintiff and appellant mentally ill), were procured by virtue of undue influence exerted by said appellee Robinson upon said physicians".

The allegations above set forth constitute the only claim for damages against appellee Robinson.

ARGUMENT

QUESTION NO. 1:

Does the mere preparation by a practicing attorney of a petition for the commitment of a mentally ill person to a State Hospital gives rise to an action under the Civil Rights Statute, 42 *U. S. C.*, Section 1983 and 28 *U. S. C.*, Section 1343?

The District Judge held "No", and the Appellant claims "Yes".

The amended complaint fails to state a cause of action against appellee Robinson.

There is no allegation in the amended bill attributing malice or motive or wrongdoing or the violation of any statute or law giving rise to an action for damages. The only allegation, in paragraph 5, is that the appellee Robinson "prepared and drafted a petition" and that "he induced a certain William Pugh" to sign it. The only other allegation upon which the appellant bases his suit against appellee Robinson, is that the latter "exerted undue influence" upon two doctors. The amended bill does not specify the particular acts upon which the Court could determine that undue influence was exerted on the doctors — he does not claim that the act was wrong or malicious or fraudulent. Conceding that the amended complaint could be amended to conform with the proper rules of pleading, as it now stands it does not state a legal cause of action against the appellee Robinson.

No conspiracy is alleged. The appellee, Robinson, a then practicing attorney, prepared a petition for the admission of a mentally ill person to a state hospital. This is the usual and ordinary procedure required by the Probate Code of the State of Michigan. The attorney did not sign the petition. It was signed by a deputy sheriff, which, under the Michigan statute, is permissible. So far as the amended bill is concerned, the appellee Robinson had nothing further to do with any of the proceedings which later resulted in appellant's commitment. It is not alleged that he appeared in the Probate Court at the time of the hearing; that he gave testimony in respect to the contents of the petition; that he testified to facts which were unwarranted or untrue; that he advocated the commitment of appellant to a mental institution; or that he committed any act whatsoever to deprive appellant of the rights, privileges and immunities guaranteed to him by the Federal Statutes. There is no allegation that he conspired wrongfully with any state or county official, judge, or other official, to deprive appellant of the rights so guaranteed. The appellee Robinson could not, in the absence of an unlawful conspiracy, act under "color of law" as used in the act under consideration. Such act, if it occurred, must have occurred after the petition in question was prepared, and by some other person upon whom jurisdiction to act had been conferred by a state statute, Appellee Robinson was

possessed of no power nor clothed with any authority of state law when he dictated the petition in question.

Pickering, et al. vs. Pennsylvania R. Co., C. C. A. Pa. 1945; 151 F. 2d 240.

Nor does the amended complaint in this case allege that the appellant is guaranteed any right or privilege or immunity against being declared insane. In order to predicate a right of action against the appellee Robinson, the appellant must allege and prove that the Federal Statute guarantees him immunity from the action taken. The Civil Rights statute, under which the claim of the appellant is presented, only prohibits one person from using a state law to deprive the appellant of his civil rights.

Stefonelli vs. Minard, 342 U. S. 117, 96 Law Ed. 138, holds that the act for deprivation of rights "should be construed so as to respect the proper balance between the states and the Federal government in law enforcement". (Syllabus).

Bottone vs. Lindsley, 170 F. 2d 705, holds that this section does not protect private rights against an invasion by individuals.

Williams vs. Yellow Cab Co. of Pittsburgh, 200 F. 2d 302;
Whittington vs. Johnston, et al., 201 F. 2d 810.

Whittington vs. Johnston, supra, is a case directly in point. This case was decided in the United States Court of Appeals January 29, 1953. The appellant sued the respondent and others for damages, claiming a conspiracy to deprive her of her civil rights by causing her to be declared insane by an Alabama Probate Court, when she was in fact sane. The allegations of the complaint are almost identical with the allegations of the complaint under discussion. The complaint alleged that she was confined in jail awaiting commitment to a mental institution and that through a conspiracy, defendants caused her to be declared insane. In dismissing the action on motion, the District Court held that the Civil Rights Act did not protect a citizen against deprivation of liberty without due process of law under the provisions of the Fourteenth Amendment. The Court held that the Civil Rights statute

pertained only to attempts to protect persons from deprivation of equality — of "equal protection of the law", or "equal privileges or immunities under the law". On appeal, the Circuit Court of Appeals stated that the Civil Rights Act —

> "does not purport to create a cause of action for conspiracies to deny due process. Yet the burden of the conspiracy counts is not that defendants conspired to deny plaintiff equality under the law, but that they conspired to deprive plaintiff of her liberty without due process. The two propositions are quite distinct. They are not equivalents."

Citing *Mitchell vs. Greenough*, 100 F. 2d 184; *McShane vs. Moldovan*, 172 F. 2d 1016; *Allen vs. Corsano*, 56 F. Supp. 169. The Court continues in its discussion of the allegations of the bill of complaint, stating that —

> "No facts are pleaded which show that plaintiff has been subjected to any inequality of treatment. There is no charge that by said proceedings she has been subjected to any different or greater hazard than any other person against whom the Alabama statutes might be invoked, nor that she was deprived of any right or immunity which might be enjoyed by any other person under the law."

The Court then held that the complaint did not state a cause of action under the Civil Rights Act, upon which the present complaint is based.

In the Whittington case, supra, the complaint alleged that Dr. Johnston, the examining physician, acted at the request of the other four defendants and signed a medical certificate that the plaintiff was insane. In the instant case, the appellant alleges that the appellee Robinson "exerted undue influence" upon two examining physicians and as a result, he was subsequently declared insane and committed to a mental institution. All of these proceedings were taken by virtue of the provisions of the Michigan statute. There is no question in the case at bar as to the constitutionality of the statute regulating procedure for commit-

ment of individuals to mental institutions. The opinion in the Whittington case continues —

> "It is non sequitur to say that merely by instituting the lunacy proceeding, the defendants 'caused' plaintiff to be deprived of her right to due process within the meaning of 8 U. S. C. A., Sec. 43. If there was any denial of due process, the efficient cause thereof was the omission of the state Probate Judge to give notice of the proceedings. (In the instant case there is no claim that notice was not given and that the statute was not complied with insofar as procedure is concerned). That failure is not attributable to these defendants. * * * These defendants had no duty in that behalf. They simply instituted the lunacy proceeding as the Alabama statute authorized them to do, and left the conduct thereof wholly to the discretion of the probate judge whose duty and function it was to give any necessary notice."

The procedure adopted in the instant case by the appellee Robinson, was only the preparation of the petition authorized by the Michigan statute. He had nothing further to do with the matter except, as the Court might find, "influenced" the doctors to declare appellant mentally ill. The subsequent proceedings were conducted by various other and sundry persons entirely unconnected with the Appellee Robinson. The appellee Robinson, under the authority of the Whittington case, had a right to act upon the presumption that the Michigan lunacy statute is constitutional, as did the Probate Judge, —

> "The mere institution of the lunacy proceeding, without more, is too remote in the chain of causation to support an action under 8 U. S. C. A., Sec. 43, for 'causing' plaintiff to be deprived of the right to due process."

The Court went on to reason, logically, that every person who signs such a petition, or who prepares one, does so at his own peril and may become liable in damages should the lunacy statute be declared unconstitutional or invalid.

> "To hold the defendants liable in such circumstances would impose upon them vicarious liability not contemplated by 8 U. S. C. A. Sec. 43. That statute does not require those who regularly institute a lunacy proceeding under a state statute to stand sponsor for the validity of the statute, nor for the acts of the state officers in administering it."

The Court goes on to hold, without qualification, that neither the Fourteenth Amendment nor the Civil Rights Act protect a person against lunacy proceedings even though they are wilfully and maliciously instituted. The Court further held that if there was any right of action or if the plaintiff had any grievance, he should proceed in a state court. Although the Court in the Whittington case did not decide that the Federal Court lacked jurisdiction, they did hold that the complaint failed to state a cause of action within the scope of the Civil Rights Act. A rehearing was denied April 13, 1953.

In *Bottone vs. Lindsley*, supra, a case involving a claim against a lawyer who represented the plaintiff unsuccessfully in a suit in the state court of Colorado, which was appealed and affirmed, the Circuit Judge laid down the general rule that 8 *U. S. C. A.*, Sec. 43 does —

> "not have the effect of taking into Federal control the protection of private rights against invasion by individuals,"

citing *Hodges vs. United States*, 203 U. S. 1; *Logan vs. United States*, 144 U. S. 263; 36 L. Ed. 429; *Love vs. Chandler*, 124 F. 2d 785. This opinion further held that in order to come within the Civil Rights statute, the proceedings in the state court must be a complete nullity, with a "purpose to deprive a person of his property without due process of law." The Court continues by saying that —

> "To hold otherwise would open the door wide to every aggrieved litigant in a state court proceedings, and set the Federal courts up as an arbiter of the correctness of every state decision."

Finally, the Court held that the appellant in the Federal Court regularly invoked the aid of the State Court, had had

his day in court, appealed to the Supreme Court of Colorado, unsuccessfully, and added —

> "It is clear that the appellant was not denied due process of law or equal protection of the law cognizable under the Civil Rights Act."

It seems clear, therefore, that the appellant has not brought himself within the provisions of the Civil Rights Act. Conceding for the purpose of the motion to dismiss, that all averments in the complaint are true, it is obvious by reason of the decisions cited in this brief, that the appellee Robinson, did not "subject" or "cause to be subjected", the appellant, "under color of any statute, ordinance, regulation, custom, or usage of the State of Michigan", for the purpose of depriving appellant of any rights, privileges or immunities secured by the Constitution.

"Color of law" is the "misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with authority of state law." Therefore, in order to come within the provisions of the Civil Rights Act, the appellan must allege, and prove, that (a) the appellee Robinson misused some power by virtue of state law; (b) that appelee Robinson "is clothed with authority of state law."

> *Pickering, et al. vs. Pennsylvania R. Co.*, supra; *Shemaitis vs. Froemke*, 189 F. 2d 963.

It is further clear that the Civil Rights Act upon which appellant predicates his theory of recovery, only guarantees that all citizens of the United States shall enjoy equality under law. The amended bill is not based upon a violation by the appellee Robinson of the Fourteenth Amendment which guarantees due process of law. The lunacy statute affects all Michigan citizens alike. The statute itself provides for a defense against lunacy proceedings. This defense is available to all citizens who may be confronted with lunacy proceedings. It favors no individual or class. Unless, therefore, the appellant presents a complaint alleging that the Michigan lunacy statute discriminates against him as opposed to other citizens in a like

situation, the Federal Courts will not take cognizance of his complaint.

In commenting upon the allegations of the complaint, the District Court stated in his opinion (R. 35) that —

> "No case has been discovered wherein the Civil Rights Statute, on which plaintiff bases his action, has been held to give one in the position of the plaintiff an action against a private individual not acting 'under color of law' for wrongs done, even though the acts of such individual may have ultimately resulted in a deprivation of constitutional rights, privileges or immunities. Rather such statute appears to have been limited in application to persons who have used or misused the powers granted to them by virtue of political offices, held by them, for the pose of *wilfully* depriving a person of constitutional rights, privileges or immunities. Williams vs. Yellow Cab Company of Pittsburgh, 200 F. 2d 302 (C. C. A. 3, 1952); Shemaitis v. Froemke, 189 F. 2d 963 (C. C. A. 7, 1951); Watkins v. Oaklawn Jockey Club, 183 F. 2d 440 (C. C. A. 8, 1950)."

The Court of Appeals affirmed the ruling of the District Court with reference to the claim against the respondent Robinson in the following language:

> "We are in accord with his (District Judge Kent) ruling that Robinson, a private practitioner, in preparing the papers filed as the first step in the proceedings resulting in Kenney's commitment to the Kalamazoo State Hospital, was not amenable to an action based on the Civil Rights Statute."

See *Whittington vs. Johnston*, 201 F. (2d) 810, 811.

CONCLUSION

We respectfully submit that the Circuit Court of Appeals properly determined the question involved on the motions to dismiss and properly affirmed the holding of the District Court in the cases of the three respondents Killian, Hatfield and Robinson.

WHEREFORE the petition for writ of certiorari should be denied.

Respectfully submitted,

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